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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

-----x
3 UNITED STATES OF AMERICA,

4 Plaintiff,

v.

16 CV 3565 (DLC)

5 AMERICAN SOCIETY OF COMPOSERS,
6 AUTHORS AND PUBLISHERS,

7 Defendant.
-----x

8 Related to
9 UNITED STATES OF AMERICA,

10 Plaintiff,

v.

41 CV 1395 (DLC)

11 AMERICAN SOCIETY OF COMPOSERS,
12 AUTHORS AND PUBLISHERS,

13 Defendant.
-----x

14 New York, N.Y.
15 June 16, 2016
16 5:00 p.m.

17 Before:

18 HON. DENISE L. COTE,

19 District Judge

20 APPEARANCES (Telephonic)

21 UNITED STATES DEPARTMENT OF JUSTICE
22 ANTITRUST DIVISION

23 BY: KELSEY SHANNON
24 DAVID KULLY

25 PAUL, WEISS, RIFKIND, WHARTON & GARRISON
Attorneys for ASCAP

BY: JAY COHEN
ANDREW FINCH
HALLIE GOLDBLATT

RICHARD REIMER
CLARA KIM
ASCAP General Counsel

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1 (In chambers)

2 THE COURT: Good afternoon, counsel.

3 MR. SHANNON: Good afternoon, your Honor.

4 THE COURT: I have you on the speaker phone because my
5 law clerk and a court reporter are with me. We'll briefly take
6 appearances.

7 For the United States?

8 MR. SHANNON: This is Kelsey Shannon for the United
9 States, with me is David Kully.

10 THE COURT: And for ASCAP?

11 MR. COHEN: Yes, your Honor, Jay Cohen, Andrew Finch
12 and Hallie Goldblatt of Paul, Weiss.

13 Mr. Reimer is on the phone, as well as Ms. Kim,
14 general counsel of ASCAP.

15 THE COURT: Thank you. And I believe we have other
16 people who are participating by telephone. Sadly, this
17 conference isn't being taken in the courtroom, and so we have
18 certainly allowed others who wish to participate to be on the
19 line with us. I understand Mr. Steinthal is on the line, and
20 there may be members of the press also listening in.

21 I want to just personally express my appreciation to
22 counsel for your flexibility. As I know my chambers told you,
23 I have been selected to serve as a juror in a state court
24 proceeding and wasn't available to conduct this conference
25 today in my courtroom during the ordinary trial day. So thank

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1 you very much for your flexibility and cooperation with my
2 schedule.

3 I have an application for an approval of a settlement
4 agreement and issuance of an order. It arises out of a civil
5 contempt proceeding brought by the Department of Justice
6 against ASCAP. And I will briefly describe what I understand
7 its principal components to be and the history behind this, and
8 then give both the Department of Justice and ASCAP an
9 opportunity to be heard, and certainly to correct any
10 misunderstanding that I might have gathered even though I have
11 tried to read their papers with care.

12 As I understand it, after proceeding before me in the
13 ASCAP Rate Court litigation that involved Pandora, and in
14 particular a decision I issued in 2014, the Department of
15 Justice at some point thereafter began an investigation about
16 coordination that appeared to have occurred and is described in
17 my opinion, that is, coordination between ASCAP and some of its
18 publisher members.

19 And as a result, among other things, the Department of
20 the Justice learned that ASCAP had issued roughly 150 contracts
21 beginning in the year 2008 that violate the terms of the
22 governing consent decree here in which they took for themselves
23 through side letters exclusive licensing rights, thereby
24 restricting the signator's rights to negotiate and execute
25 direct licensing agreement.

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1 At the request of the Department of Justice in 2015,
2 ASCAP rescinded any such side agreements that remained
3 outstanding and has agreed to pay or perhaps already has paid
4 \$1.75 million as a result and entered into certain agreements
5 that are contained in this proposed order.

6 Also, as part of this order and changes that have been
7 made internally within ASCAP, any future such side agreements
8 or agreements issued in connection with advances that are given
9 to members has agreed that the general counsel's office will be
10 involved in final approval of any such contracts. So that's
11 one component of what I understand has happened here.

12 A second component has to do with the very fact of the
13 coordination that was described in the Pandora decision, and as
14 a result, a code of conduct or revised code of conduct has been
15 executed or put into place by ASCAP. It includes recognition
16 of the duty for certain board members to recuse themselves in
17 appropriate circumstances from board actions when the actions,
18 particularly approval of licensing agreements or rates, might
19 present a conflict of interest with the publisher's separate
20 business activities. I focused in particular in that regard on
21 Sections 2A and 4A of the code of conduct, and I'm happy to
22 have counsel point me to any other sections they would like me
23 to particularly review in that regard.

24 And as part of that overall concern and pattern and
25 practice, ASCAP has undertaken a training program and other

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1 activities which are designed to make sure that issues of
2 conflict of interest are at the forefront of the mind of its
3 executives and significant publisher members, particularly
4 members of the board. And the Department of Justice points out
5 there's been a change in executive leadership, at least in some
6 positions at ASCAP, which will provide an opportunity to have a
7 fresh look at all these matters and have a newly trained staff
8 with significant authority.

9 And then there's a third component, as I understand
10 it, and that is a host of remedial measures that have been put
11 in place for approximately ten years. However, ASCAP has been
12 given the right to petition this Court within five years to
13 have those remedial measures removed, and the parties will, of
14 course, I expect, be discussing that on an ongoing basis as we
15 get close to the five-year mark.

16 So that's what I understand to be the principal
17 components of what I'm asked to review and approve in
18 connection with this civil contempt proceeding. And let me now
19 turn it over first to the Department of Justice, you,
20 Mr. Shannon, and then Mr. Cohen for any further comment or
21 explication that you might wish to share with me.

22 Mr. Shannon.

23 MR. SHANNON: Thank you, your Honor.

24 I think that is a very good description of what
25 brought us here. I think there's only one piece that may be

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1 slightly incorrect, which is the last piece you said regarding
2 the termination after five years rather than ten. The
3 provision that sunsets the decree after ten years allows ASCAP
4 to approach the Department of Justice and request that we
5 consider moving the Court to end the decree after five years
6 but doesn't provide ASCAP with its own ability to move. So the
7 obligation is on us -- or the opportunity is to us rather than
8 to ASCAP.

9 Just broadly speaking, I think the history that you
10 described is correct and gets at what brought us here. We
11 opened an investigation into conduct that started with the
12 Pandora conduct but was somewhat broader than that. We had
13 concerns about inference with the ability of ASCAP members to
14 directly license. We looked at a broad array of conduct and a
15 broad swath of kind of ASCAP's relationships with its members.

16 In the course of that investigation, we discovered the
17 existence of these exclusive licensing arrangements between
18 ASCAP and many of its members. We engaged ASCAP throughout
19 this process, told them what our concerns were, both with the
20 exclusives with the Pandora conduct, more broadly with the
21 importance of direct licensing in the context of ASCAP, and
22 had, over the period of several months or maybe even more than
23 that, many, many discussions with ASCAP about what our concerns
24 were, how they might be addressed, and what ASCAP might do.

25 I think one thing that is a little bit tricky, and I

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1 think you have got it when you divided the world into three
2 pieces, is that there are some steps that ASCAP has taken
3 already that are not part of the proposed settlement agreement
4 and order but were voluntary steps. The code of conduct is not
5 incorporated into the settlement agreement and order, although
6 one important piece of it, which is the conflict of interest
7 rule, is in Section 4C of the proposed settlement.

8 Additionally, as you noted, ASCAP has had personnel
9 turnover over the last year, has changed certain policies,
10 importantly including the process by which exclusives -- sorry,
11 the process by which advances and guarantees are entered into
12 by the company.

13 And then what you described as the third component are
14 the injunctive provisions of the proposed settlement agreement
15 and order, most notably and most importantly, I think the
16 restrictions on publisher involvement in ASCAP's licensing
17 decisions. Many of the concerns described in your Honor's
18 Pandora decision and that we saw in our investigation related
19 to the relationship between ASCAP's board members and ASCAP as
20 a licensing agent.

21 The proposed settlement agreement and order will
22 prohibit any of these publisher board members from having any
23 involvement in ASCAP's licensing decision going forward. So
24 what we saw or what was described in your Honor's decision of
25 negotiations happening between Pandora and ASCAP and the

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1 publisher board members weighing in and getting involved in
2 those negotiations should not happen under the proposed
3 settlement agreement and order.

4 Even publishers who are not board members, and
5 therefore do not present exactly the situation that we saw in
6 Pandora, are prohibited under the proposed settlement agreement
7 from having responsibility for overseeing or approving
8 licensing activities.

9 THE COURT: Thank you.

10 Mr. Cohen.

11 MR. COHEN: Yes, good afternoon, your Honor.

12 So I don't really have a lot to add. We put a
13 submission in last Friday. We think that this is a reasonable
14 resolution of this investigation from ASCAP's standpoint. As
15 the Court noted and as Mr. Shannon noted, ASCAP had taken a
16 number of steps proactively prior to entry into the proposed
17 settlement, and we have committed to fulfilling of all of the
18 mandates of the settlement.

19 THE COURT: Thank you very much, Mr. Cohen. And I
20 want to commend you and ASCAP on cooperating with the
21 Department of Justice and reacting responsibly in this
22 connection.

23 I have reviewed the terms of the proposed settlement,
24 and based on this review, the review of the submissions by the
25 Department of Justice and by ASCAP and what I have learned this

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1 afternoon through this conference call, I'm prepared to sign
2 the order and will be doing that this afternoon.

3 Thank you very much. Is there anything else anyone
4 wishes to add before we conclude this conference?

5 Mr. Shannon?

6 MR. SHANNON: No, your Honor. Thank you.

7 THE COURT: Mr. Cohen?

8 MR. COHEN: No, your Honor.

9 THE COURT: Thank you so much.

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